93-886

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FEILBERTO FLORES, ANGEL L. FONTANEZ and AMADOR RODRIGUEZ,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

PATRICK A. TUITE
Counsel of Record
105 West Adams Street
Suite 3100
Chicago, Illinois 60603
(312) 641-1022
Attorney for Petitioner Angel L. Fontanez

ALLAN A. ACKERMAN
Counsel of Record
2000 N. Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891
Attorney for Petitioners Feilberto Flores and Amador Rodriguez

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTIONS PRESENTED

I.

In *Wheat v. United States*, 486 U.S. 153 (1988), the Court stated that Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. * * * Not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation.

Based on the above, this petition asks:

II.

Whether *Wheat v. United States*, 486 U.S. 153 (1988), sanctions the waiver of conflict-ridden counsel in defiance of the independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them?

III.

Whether the *Wheat* waivers contemplate trial court admonitions which necessarily include, for either Fifth or Sixth Amendment purposes:

1) that petitioners would have time to contemplate or consider his/her decision and could consult, prior to any decision, with independent counsel, either appointed or retained, regarding the pitfalls of the continued retention of conflict-ridden-counsel;

2) that if petitioners agreed that disqualification is appropriate, then new counsel (either retained or appointed) would have ample opportunity to prepare and defend?

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the court of appeals (Pet. App., 1a-25a) is reported at 5 F.3d 1070.

JURISDICTION

The opinion and judgment of the court of appeals was entered on September 23, 1993 (Pet. App., 1a-26a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution states in part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence.

FEDERAL RULE INVOLVED

Rule 44(c), Fed.R.Crim.Proc., states:

> (c) Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

STATEMENT

On October 31, 1990 an indictment was returned in the United States District Court for the Northern District of Illinois charging petitioners Flores and Fontanez with conspiracy to distribute and possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. On December 20, 1990 a superseding indictment was returned adding Rodriguez (the named petitioner herein) as a joint conspirator. The cocaine conspiracy, per the superseding indictment, alleged drug-related misconduct "beginning at the latest in or about September 1990 and continuing until on or about October 5, 1990" (R. 27).[1]

Each petitioner (save for Fontanez) was denied release pending trial. Each was represented by retained counsel. The *sine qua non* of this petition revolves around the conflicts of interest surrounding petitioners and counsel.

1. On January 29, 1991 (one week prior to the scheduled joint jury trial) the government presented a motion to **disqualify** all defense counsel (Pet. App., 28a-40a; R. 70). The government asserted that the interaction between all defense counsel and the petitioner(s) rose to the level of "**a virtual hornet's nest of conflicts of interest**" (Pet. App., 29a). The government submission noted, *inter alia*, that each attorney had previously represented Rodriguez. Further, the current attorney for Flores had represented Rodriguez in at least two prior prosecutions while the cur-

[1] Flores and Fontanez were arrested in an apartment located on the north side of Chicago during the evening hours of October 4, 1990. Rodriguez was serving a federal sentence imposed for violating federal probation at the time the superseding indictment was returned.

rent attorney for Rodriguez had previously represented Fontanez **in these proceedings** while the remaining attorney (for Fontanez) had represented Rodriguez during recent probation revocation proceedings. Given that scenario, the government maintained that all attorneys should be disqualified (a graphic illustration of the interlocking attorney-client relationship is reproduced at pg. 8, summary of argument, *infra*).

On January 31, 1991 the custodial petitioners were brought before the trial court. The trial court chided the prosecution for failing to earlier call the conflict situation to the attention of the court, but nonetheless proceeded to superficially comply with Rule 44(c). The trial court asked each petitioner a series of "leading" questions that resulted monosyllabic answers (yes/no). Deeming these answers satisfactory, the trial court directed that Flores and Fontanez go forward with their scheduled jury trial on February 8 with the Rodriguez jury trial to follow.[2] Hence, each petitioner remained represented by the same retained attorney.

On February 8, 1991, immediately prior to the commencement of the Flores/Fontanez joint jury trial, counsel for the government filed a "motion for judicial inquiry" (Pet. App., 41a-43a; R. 83). Within that submission government trial counsel notified the trial court that during pretrial interviews with the primary prosecution witness, an informant named Cabral, prosecutors learned that trial counsel for Flores had been paid legal fees by Cabral (wire transfers using multiple fictitious names). Those attorneys'

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[2] The trial court, while declining to disqualify any defense lawyer, *sua sponte* severed the Rodriguez trial from that of the co-defendants/petitioners in an effort to compensate for the conflicts of interest (Tr. 32-33; 1/31/91).

fees were paid toward the representation of Jose Gomez, a drug supplier to the petitioners during the time-frame of the indictment. A terse colloquy surrounding the new government revelations with the attorney in question revealed only his denial of ever receiving fictitious money orders from Cabral for Gomez (while acknowledging he had represented Gomez; transcript reproduced App., 44a-46a).[3] The trial court made no inquiries nor directed any admonitions for the petitioners, *vis-a-vis*, these revelations.

2. The Flores/Fontanez jury trial culminated in plenary guilty verdicts on February 13, 1991 (R. 89). The separate Rodriguez jury trial commenced on February 20, 1991. The Rodriguez jury returned a guilty verdict on February 22, 1991.

In each trial, the government's primary witness was Cabral. In substance, his cumulative testimony revealed that he had peddled cocaine for Gomez from approximately 1988 until Gomez was arrested in late 1989 or early 1990. Petitioners were among Cabral's customer base. Additionally, Cabral (and Gomez) from time-to-time purchased cocaine from petitioners. After Gomez's arrest, Cabral received cocaine on consignment from petitioners. Cabral was arrested by federal agents on October 1, 1990. At that time he was in possession of approximately three kilos of cocaine and $75,000.00. Post-arrest, Cabral opted for a change in lifestyle and agreed to be a federal in-

[3] Cabral was peddling cocaine for Gomez. His customers included the petitioners. Gomez, post-federal-conviction, became a government informant. Cabral later began receiving cocaine, on consignment, from the petitioners. The indictment impleaded, and trial evidence included cocaine related misconduct going back to at least 1988.

formant. For the next few days, under the auspices of federal agents, Cabral picked up cocaine and money. On October 4, 1990, he met Fontanez by pre-arrangement on the north side of Chicago and remitted cocaine and monies to Fontanez. Fontanez carried the merchandise and money to a nearby apartment. Flores was in that apartment, apparently waiting for Fontanez. As Fontanez entered the apartment, so did a group of federal agents. Flores and Fontanez were arrested. The apartment was subject to a plenary search. Additional drugs and drug paraphernalia were seized as were clothing and personal items being stored there for Rodriguez. Flores and Fontanez were immediately charged. Rodriguez remained at-large until October 9, 1990 when he voluntarily surrendered to F.C.I. Terre Haute, Indiana, to commence service of his federal probation revocation sentence. While at large Rodriguez communicated with Cabral.[4] They discussed the possible distribution of another twenty-five kilos of cocaine after Rodriguez was scheduled to depart for service of the federal probation revocation sentence. Rodriguez was not charged in the drug conspiracy until a superseding indictment was returned in late December 20, 1991.

Flores was sentenced on April 3, 1991. Immediately prior to sentencing, Flores submitted a *pro se* Rule 33 motion alleging, *inter alia*, ineffective assistance of counsel. Both the trial court and counsel for Flores suggested the mo-

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[4] The affirming opinion noted:

> Rodriguez explained that if Flores' lawyers said that Cabral was "ok," the two of them would work together in distributing the 25 kilograms. (App. 7a)

The "Flores' lawyers" were Seiden and Samotny. Seiden terminated his Fontanez representation after the return of the superseding indictment, opting to represent Rodriguez.

tion lacked timeliness and same was denied absent a hearing (R. 111).[5]

4. The court of appeals affirmed the convictions.

While rejecting the conflict of interest issue, the court of appeals simply found that per Seventh Circuit precedent the trial judge complied with Rule 44(c) and thus rejected petitioners' Sixth Amendment argument (Pet. App., 14a-15a). While rejecting petitioners' importunings for conviction vacation, the court of appeals eschewed the opportunity for exploration of issues that have split the circuits. Those issues include:

(a) Whether a defendant should be given time to consider the conflict admonitions?;

(b) Whether a defendant should be told that in the event that defendant opts to agree that disqualification is in the best interest, that new counsel may be retained or appointed and that additional trial preparatory time would be available?;

(c) Whether a defendant should be told to consult with independent counsel, either appointed or retained, regarding the pitfalls of continuing with conflict-ridden-counsel?

At bottom, the court declined to recognize any out-of-circuit precedent defining the nature and scope of Rule 44(c) admonitions. Further, the court declined to consider whether the conflicts of interest were so devastating or overwhelming as to proscribe any Sixth Amendment waiver.

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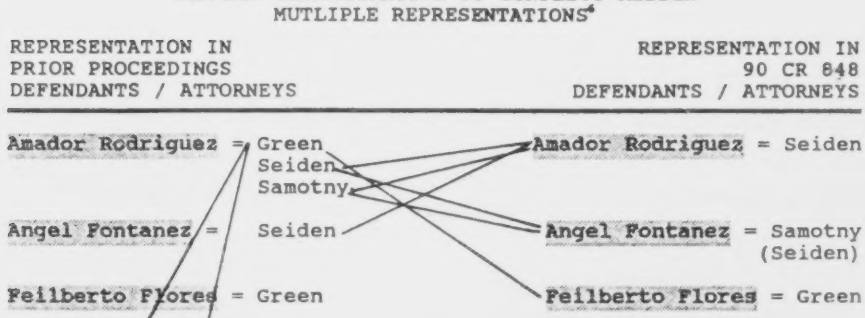
[5] Rodriguez was sentenced to life in prison without parole (R. 119); Flores was sentenced to thirty-three years in custody and Fontanez received a twenty-two year sentence.

REASONS FOR GRANTING THE WRIT

A.

SUMMARY OF ARGUMENT

GRAPHIC DEMONSTRATION OF CONFLICT-RIDDEN MUTLIPLE REPRESENTATIONS[6]


REPRESENTATION IN PRIOR PROCEEDINGS DEFENDANTS / ATTORNEYS
REPRESENTATION IN 90 CR 848 DEFENDANTS / ATTORNEYS
Amador Rodriguez = Green
Seiden
Samotny
Angel Fontanez = Seiden
Feilberto Flores = Green
Amador Rodriguez = Seiden
Angel Fontanez = Samotny (Seiden)
Feilberto Flores = Green
JOSE GOMEZ = Green (Cocaine supplier to Rodriguez/Flores)
CARLOS CABRAL (Paid Gomez legal fees to Green -- primary prosecution witness in this indictment and trials)

86 CR 698*
(N.D. Ill)
U.S. v. Rodriguez
Defendant-Rodriguez
Attorney-Green

86 CR 698***
(N.D. Ill)
U.S. v. Rodriguez
Probation Revocation
Defendant-Rodriguez
Attorneys-Seiden and Samotny

1990 Ohio**
Docket Number Unknown
Ohio v. Rodriguez
Defendant-Rodriguez
Attorney-Green

Attorneys-Seiden and Samotny representing others

90 CR 848****
(N.D. Ill)
U.S. v. Rodriguez
U.S. v. Flores
U.S. v. Fontanez

Defendant-Rodriguez
Attorney-Seiden

Defendant-Fontanez
Attorney-Samotny (Seiden)

Defendant-Flores
Attorney-Green

LEGEND:
(in chronological order)

* First proceeding
** Second proceeding
*** Third proceeding
**** Fourth proceeding

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[6] A picture shows me at a glance what it takes dozens of pages of a book to expound. Ivan Turgenev, *Father and Sons*, ch. 16, Translated by Harry Stevens.

B.

ARGUMENT

The case is of exceptional importance in the administration of federal criminal law.

Reported opinions fail to reveal any parallel decisions in this issue. Perhaps the most telling reason that research discloses no such parallel decisions is simply because the Court has not seen a **hornet's nest of conflicts** similar to that at bar in any reported federal criminal decision.

Bedrock Sixth Amendment principles note that the duty of loyalty to a client is "perhaps the most basic" responsibility of counsel and that "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interest."[7] Of course, conflict-free assistance of counsel is a clear component of the Sixth Amendment.[8] The opinion of Chief Justice Rehnquist in *Wheat* fails to provoke any analytical tension. In *Wheat* the court found, *inter alia*, that the integrity of the court, professional ethical responsibilities and the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation.[9] Indeed, *Wheat* states:

> "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."[10]

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[7] *Strickland v. Washington*, 466 U.S. at 692, 104 S.Ct. at 2067.

[8] *Glasser v. United States*, 315 U.S. at 60, 70, 62 S.Ct. 457, 464 (1942).

[9] 486 U.S. 153, 160, 108 S.Ct. at 1698, citing *Glasser v. United States*, with approval.

[10] 486 U.S. at 160, 108 S.Ct. at 1698.

Hence, it is reasonable to conclude that the Court has never sanctioned waiver at the whim of the defendant. Were it otherwise, *Wheat* would have been decided differently.

At bar, each defense attorney had unquestioned divided loyalties. As to **Attorney Green**, representing Flores, those loyalties were fractured almost beyond imagination: In prior federal proceedings, Attorney Green had represented Rodriguez as well as Gomez. Green was paid for representing Gomez by Cabral who is the primary prosecution witness against Rodriguez. Cabral was also the primary prosecution witness against Flores.

Seiden and Samotny represented Fontanez early on in this case. Prior to representing Fontanez, both had represented Rodriguez in federal criminal probation revocation proceedings.[11] Rodriguez needed Fontanez as a witness at sentencing. Seiden reported to the court that Fontanez would not testify.[12] Notwithstanding the impleaded conflicts, none of the defense lawyers called any of their collective antagonistic interests to the attention of the trial

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[11] In *United States v. Tatum*, 943 F.2d 370, 378-79 (4th Cir. 1991), the court found reversible error based upon conflicts involving trial and co-counsel. The court endorsed a vicarious conflict theory of prejudicial error based on counsel(s) close association. In *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1252-54 (9th Cir. 1989), the court found prejudicial error under a conflict of interest theory while noting that conflicts arise in both *simultaneous* and *successive* representations of defendants and co-defendants . . . citing *Wheat*, with approval at 1252.

[12] This even though Fontanez had been convicted several weeks earlier in that severed trial under the same indictment. Attorneys Seiden and Samotny shared offices at 180 W. Washington, Chicago, Illinois, prior to and during these trials. Attorney Green lived in Hawaii prior to and during these trials.

court.[13] Government counsel, one week prior to the scheduled joint jury trial, filed a motion to **disqualify** all defense counsel insisting that the **hornet's nest of conflicts** compelled disqualification.[14]

The Court need only imagine the scenario. Trial is a week away. Petitioners, clad in prison garb, are paraded into the well of the court. Prosecutors, defense counsel and court personnel surround them. The petitioners had never previously spoken to the court.[15] Out of nowhere,

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[13] In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), Justice Powell noted: "The private bar may be less alert to the importance of avoiding multiple representation in criminal cases.", 446 U.S. at 346 and n.11 citing, with approval, *Lowenthal*, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va.L.Rev. 939, 950 and n.40 (1978) and *Geer*, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 Minn.L.Rev. 119, 152-157 (1978). The unwritten reality is simply that either discharge or disqualification means the remittance (back to the defendant) of attorneys' fees, hence the reluctance of the private criminal defense bar to, *sua sponte*, bring conflict questions to the attention of the trial court. See *Wood v. Georgia*, 450 U.S. 261, 267-271 (1981). Attorneys appointed by the court, or members of a public defenders office, lacking fiscal incentive, infrequently become embroiled in [even potential] conflict-of-interest situations.

[14] On appeal, the government changed theories. No longer asserting the "hornet's nest" conflict concept, the government defended the failure to disqualify based upon petitioners' waivers.

United States v. Iorizzo, 786 F.2d 52, 57 (2nd Cir. 1986), is strikingly similar. In *Iorizzo* the government demanded disqualification below, urging that defense counsel had an irreconcilable conflict of interest. While reversing federal mail fraud convictions, predicated on trial counsel's conflict-of-interest, the court of appeals specifically noted that the government changed theories from the District Court to the Court of Appeals (. . . "The government responds with arguments that are entirely at odds with the position taken in the district court" . . . 786 F.2d at 57).

[15] The petitioners were arraigned on the superseding indictment on January 8, 1991. Defense counsel entered pleas of not guilty and waived the formal reading of the indictment. The petitioners did not address the court.

the harried trial judge understandably eager to keep to a schedule commences to relate a litany constitutional theories surrounding conflicts of interest. Each attorney denies any conflict. The record fails to support the notion that any of the petitioners had received or reviewed the government's **hornet's nest-disqualification** motion (Flores and Rodriguez were brothers, Fontanez was their brother-in-law).[16] The court asks only "leading" questions of each petitioner, receiving only monosyllabic answers. The trial court erroneously suggested, while severing Rodriguez's trial from the Flores/Fontanez trial, that the separate Rodriguez trial would dissipate the need for disqualification.[17] The government will **concede** that the trial judge failed to offer petitioners either any time to contemplate the constitutional waiver or any opportunity to consult with independent counsel. Further, the trial judge eschewed an admonition that in the event of disqualification, new counsel, either retained or appointed, would be available and given ample opportunity to prepare and defend.

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[16] In *United States v. Friedman*, 854 F.2d 535, 572-74 (2nd Cir. 1988), the court, while affirming various RICO convictions, noted that *Friedman*, an attorney, had seen the government's disqualification motion regarding his trial counsel at least a week prior to the hearing and *Friedman* filed his own affidavit in opposition of disqualification. While affirming the court noted that second circuit precedent counsels against asking questions designed to elicit mere "yes" or "no" answers and that in each instance the court should determine whether the defendant has had a reasonable time to digest and contemplate the risks posed by the conflict of interest . . . *Id.* at 574.

[17] In *Nealy v. Cabana*, 782 F.2d 1362, 1363, 1366 (5th Cir. 1986), the court found prejudicial error in a conflict of interest situation while noting that severance was not the appropriate antidote for prejudice flowing from a conflict of interest.

Still further, on February 8, 1991 (apparently prior to jury selection) the government filed a renewed submission ("motion for judicial inquiry"; App. 41a-43a). Government counsel explained that attorney Green (now representing Flores) had received substantial attorneys' fees from informant Cabral. These fees involved money orders bearing fictitious names (App. 41a-46a) and were paid to Green while he was representing Gomez (the cocaine supplier for the petitioners and Cabral in 1988-1989).[18] The trial judge spoke only to attorney Green, never to the petitioners. The failure of the trial judge to make further inquiry of the petitioners is startling. It suffices to say that the relationship between counsel and the informant presented an irreconcilable conflict of interest.[19] Predicated on "waiver" answers from the petitioners the Court of Appeals found that which is tantamount to the forfeiture of Sixth Amendment protections (App. 13a-15a).[20]

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[18] In *United States ex rel. Stewart v. Kelly*, 870 F.2d 854 (2nd Cir. 1989), the court, citing *Wheat* with approval, found that the trial court was correct in compelling disqualification where defense counsel had previously represented the prosecution informant. The court noted that the trial court has "an independent duty to ensure that criminal defendants receive a trial that is fair," 870 F.2d at 856, citing *Wheat*, 108 S.Ct. at 1697.

[19] In *United States v. Fulton*, 5 F.3d 605 (2nd Cir. 1993), the court traces precedent on the subject of an attorney's involvement in a similar or related offenses. The *Fulton* opinion notes that the Seventh Circuit apparently splits from sister circuits in not **compelling** disqualification, 5 F.3d at 609-614.

[20] While affirming, the court of appeals cited only Seventh Circuit decisions. The court of appeals declined to consider out-of-circuit authority clearly pointing to a different result, e.g., *United States v. Agosto*, 675 F.2d 965, 970 (8th Cir. 1982), (doubts regarding disqualification to be resolved in favor of disqualification); *United States v. Jenkins*, 943 F.2d 167, 176 (2nd Cir. 1991), (defendant encouraged to seek independent counsel and allow a reasonable time for the

(Footnote continued on following page)

The court below erroneously bottomed affirmation on waiver. Yet this Court has consistently noted:

> The government bears the burden of proving the waiver. See *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977) ("it [is] incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.' ") (citations omitted). "Courts should 'indulge every reasonable presumption against waiver,' and they should 'not presume acquiescence in the loss of fundamental rights.' " *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (citations omitted).[21]

The present petition impleads, *inter alia*, the concept of an inadequate waiver. Petitioners point out that the trial court seemingly demanded an on-the-spot waiver.

The petitioners make dual assertions. Petitioners assert that given the **magnitude** of the conflicts below, the trial court was precluded from finding a waiver. If ever there was a situation where either the independent public interest in the fairness of federal criminal trials or the in-

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[20] *continued*

defendant to make his decision); *United States v. White*, 706 F.2d 506, 508-510 (5th Cir. 1983), (concluding that inadequate waiver admonitions obviated the need to determine whether certain conflicts rendered any waiver viable). In *United States v. Martinez*, 630 F.2d 361, 364 (5th Cir. 1980), the court vacated certain drug convictions where defense counsel had a clear conflict. Citing Fifth Circuit precedent the court found ". . . the trial judge should affirmatively participate in the waiver decision by eliciting a statement **in narrative form** from the defendant . . ." *Id.* at 364. The Seventh Circuit has eschewed the "**narrative form** from the defendant" waiver requirement.

[21] *United States v. Lopez-Vasquez*, 1 F.3d 751, 753-54 (9th Cir. 1993). In *Lopez-Vasquez*, a divided court found that silent waivers in connection with appellate deportation orders violated due process.

tegrity of the legal profession mandated disqualification, this is that case.

One can imagine the public's perception of a federal criminal trial in which the participating defense lawyers had involved unwitting defendants in an ongoing game of musical chairs.[22] Where one of the attorneys had also represented the conspiratorial drug supplier, work for which he was paid in fictitious money orders by the prosecution's primary witness. Where three imprisoned Spanish-speaking defendants are hauled into a United States federal court and compelled to quickly weigh government accusations against their lawyers. It is a dilemma of the highest order: Here are the attorneys paid (by whom?) to save them. There is the government that is out to put them away. What nefarious plot is the government hoping to hatch by this sudden interest in their rights? Absent time and objective counsel, absent a clear articulation of all alternatives, turned suspicious by lack of knowledge and cultural understanding, they choose the wide road: they go with what they know. Is it not the duty of the trial court to, at a minimum, show the defendants that the other road is travelable? Can the trial court simply abdicate that responsibility to the confused whim of an untutored layman.[23] Given the above, precedent demands disqualification.

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[22] A game in which the participants (save one) are inevitably left standing alone. Also called "Going to Jerusalem."

[23] In *Ward v. United States*, 995 F.2d 1317, 1322 (6th Cir. 1993), a divided panel granted § 2255 relief finding that the trial court has the duty to determine . . . whether counsel's representation falls below **an objective standard of reasonableness** (our emphasis). The court further noted the court could not abdicate that responsibility to the parties or their families, *Id.* at 1322.

Petitioners maintain that admonitions designed to eclipse federal constitutional protections must be comprehensive. Those admonitions must necessarily include an opportunity for quiet reflection, contemplation and at least the potential for independent advice. A defendant must be advised regarding the consequences of the trial court's "warnings." If the trial court warns a pre-trial detainee about the pitfalls of multiple conflicts of interest, must not the trial court also tell the federal-pre-trial-detainee, that if the retained attorney is discharged (or disqualified) then new counsel, either retained or appointed, would be available with adequate time to consult, prepare and defend? The necessary ingredients of a valid waiver necessarily include the above components. Absent same, there can be no viable constitutional waiver.[24]

CONCLUSION

The circuits are divided on the nature and extent of waiver-admonitions and whether certain conflicts compel *per se* disqualification.

Wheat observed that federal courts have an obligation to ensure "that legal proceedings appear fair to all who observe them," 108 S.Ct. at 1697.

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[24] In *United States v. Dolan*, 570 F.2d 1177, 1181 (3rd Cir. 1978), the court affirmed an order of disqualification while noting that the inquiry process should follow *Rule 11* procedures citing, with approval, *Garcia v. United States*, 517 F.2d 272, 278 (5th Cir. 1975). *Dolan* further pointed out that the conflict inquiries are *complex and subtle*. *Id.* at 1181. *Dolan* also endorses the proposition that outside counsel might be consulted, *viz.*, disqualification *vel non*. *Dolan* was cited with approval in *United States v. Wheat*, 486 U.S. at 162, 108 S.Ct. at 1698-99.

This case provides an appropriate vehicle for the resolution of questions not reached in *Wheat v. United States*, 486 U.S. 153 (1988).

Wherefore, petitioners respectfully request that this petition for writ of certiorari be granted.

Respectfully submitted,

PATRICK A. TUITE
Counsel of Record
105 West Adams Street
Suite 3100
Chicago, Illinois 60603
(312) 641-1022

Attorney for Petitioner
Angel L. Fontanez

ALLAN A. ACKERMAN
Counsel of Record
2000 N. Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

Attorney for Petitioners
Feilberto Flores and
Amador Rodriguez